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Federal Communications Commission  
Office of the Secretary

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JUN - 3 2004

Federal Communication Commission  
Bureau / Office

In the matter of )  
Amendment of Section 73.202(b) )  
FM Table of Allotments ) MM Docket No. 02-212  
FM Broadcast Stations ) RM-10516  
(Vinton, Louisiana, Crystal Beach, ) RM-10618  
Lumberton, and Winnie, Texas) )

To: John A. Karousos  
Assistant Chief, Audio Division  
Media Bureau

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Federal Communications Commission  
Office of the Secretary

PETITION OF CHARLES CRAWFORD FOR RECONSIDERATION

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June 3, 2004

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Amendment of Section 73.202(b)	)	
FM Table of Allotments	)	MM Docket No. 02-212
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(Vinton, Louisiana, Crystal Beach,	)	RM-10618
Lumberton, and Winnie, Texas)	)	

To: John A. Karousos  
Assistant Chief, Audio Division  
Media Bureau

PETITION OF CHARLES CRAWFORD FOR RECONSIDERATION

1. Pursuant to Section 1.106 of the rules, Charles Crawford petitions the Media Bureau to reconsider its Report and Order released May 4, 2004 (Bureau's decision).

SUMMARY

2. This case pits the interests of a giant broadcaster (Tichenor) in the Houston-Beaumont radio markets at the expense of bringing a first local radio outlet to a deserving independent community (Vinton) in a neighboring state. It involves a "smoke and mirrors" switch of licensed communities designed solely to block the legitimate preference for the first local outlet at Vinton. This maneuver has no legitimate 307(b) purpose; to the contrary, it involves a "Morningside" gutting of the FM process.<sup>1</sup>

3. If the Bureau's decision is allowed to stand, it would

---

<sup>1</sup> In which an allotment to the tiny community of Morningside, Maryland, became the top-rated Infiniti outlet in the Washington-Baltimore radio markets.

siphon still more FM spectrum into the maw of major market radio at the expense of an allotment for underserved rural America.

4. The Bureau's decision illustrates the no-man's land of factors under the Tuck policy, to our knowledge never tested in the courts, that are so nebulous and subjective as to be arbitrary and capricious under the Administrative Procedure Act.

#### PETITION

5. The Bureau's decision, without the reasoned explanation required under Motor Vehicle Manufacturers Association v. State Farm Insurance Company, 463 U.S. 29 (1983), rules in favor of the major market interest and against the small town, rural interest.

#### I.

Contest between (a) straight-forward first local outlet in a rural area and (b) contrived proposal by powerhouse Houston-Beaumont market station to become the "first local outlet" for a tiny community in a corner of the market

6. We start with the small town, rural interest. Vinton is a stand-alone town, 2000 US Census population 3,338, in rural Louisiana. A Class A frequency is proposed as its first local radio station. The closest radio market is the Lake Charles, Louisiana market, ranked 205th in the nation. Broadcasting & Cable Yearbook, 2001, at D-722. While the Vinton station will likely be a part of that market, it will be on the fringe, some 25 miles from Lake Charles beyond the reach of a Class A signal which will cover only 5% of the Lake Charles Urbanized Area. This is a classic case where a relatively small rural community deserves to have its own local outlet for expression that is not contaminated by any abuse of the process on the part of a major

market broadcaster.

7. Which brings us to Tichenor License Corporation (Tichenor), owner of a number of AM and FM radio stations in the Houston and Beaumont markets. The Houston/Galveston radio market is the nation's 10th largest, with 4.6 million population in the Arbitron survey area. Broadcasting & Cable Yearbook, 2001, at D-721. The Beaumont/Port Arthur radio market is the 130th, with population of 587,000 in the Arbitron survey area. Id. at D-719. For both markets combined, the potential reach is more than 5 million people.

8. Tichenor owns at least two full Class C FM stations in the Houston and Beaumont markets. One is KOBT, formerly KLAK, licensed to Winnie, Texas, a small community located to the east of Houston. The other is KQBU, licensed to Port Arthur, Texas. These two stations broadcast from the same tower, centrally located between Houston and Beaumont. They operate with maximum radiated power and from antennas some 1,800 feet above average terrain. Their coverage areas are enormous. Coverage maps and related information are attached as Exhibit 1.

9. Tichenor's counterproposal to the allotment petition for a first local outlet to serve Vinton and surrounding rural areas has two elements. One has an arguably legitimate 307(b) purpose. The other does not. We shall start with the arguably legitimate one.

10. Tichenor owns a Class A station, KLTO, in Crystal Beach, Texas, along the Gulf Coast, operating on channel 287

which is the same channel proposed for Vinton. Channel 287A at Crystal Beach clears with channel 287A at Vinton. In the counterproposal, Tichenor would upgrade KLTO to channel 287C2 and move its transmitting location in the direction of Beaumont, closer to Vinton, which does bring its channel 287C2 in conflict with the Vinton channel 287A. There would be a gain (net after deducting losses) of 270,000 population added to the megamillions served by Tichenor stations in the Houston and Beaumont markets. There is no basis to quarrel with a fair and square choice between these two 307(b) proposals. Tichenor's problem is that under such a choice, Vinton would prevail because a first local outlet is preferred over population gains.

11. We now turn to the unsavory, illegitimate element of Tichenor's counterproposal. In order to secure its upgrade and population gains, Tichenor needed to get rid of the Vinton rulemaking proposal that is blocking it. This required a "first local outlet" for a community of license having more people than Vinton (3,338). There is nothing subtle about Tichenor. For the KLTO upgrade on channel 287C2, it chose Winnie as the new community of license - the same community of license of Tichenor's powerhouse KOBT serving the Houston and Beaumont markets. The population of Winnie (2,914) is less than the population of Vinton so this didn't get the trick done. Under Commission policy against removing a community's only local station, this step freed Tichenor to change the community of license of KOBT. Which it proposes to do, to a community named



Lumberton, Texas, up the road a little ways from Winnie, with the requisite population (8,731) exceeding that of Vinton.

12. The community of license shell game, thus, goes from Crystal Beach to Winnie to Lumberton. A regulatory Tinkers to Evers to Chance.<sup>2</sup> The evil step in this process is the move of powerhouse KOBT from Winnie to Lumberton. Tichenor isn't changing the channel or its full Class C allotment in the Commission's Table or the high powered and strategically located technical facilities of KOBT in any way. It will remain a dominant metro station unaffected by whether its community of license is Winnie or Lumberton or any of the hundreds of other communities within its huge service area. The only thing that will change is the name of the community on its station license. And the sole purpose for and advantage to Tichenor is that the Lumberton population (8,731) exceeds the population of Vinton (3,338) whereas the population of Tichenor's present community of license, Winnie (2,914) does not.<sup>3</sup>

13. To be sure, there can be valid changes in a community of license without changes in the channel or technical

---

<sup>2</sup> The Bureau was confused by this shell game, requiring Tichenor to file a statement regarding errors in assigning the wrong channels to the various communities and the issuance of a corrective supplement to the Bureau's decision.

<sup>3</sup> In another case, when the shoe was on the other foot, Tichenor condemned an opposing party's attempted similar maneuver, calling it "entirely gratuitous" and "disingenuous." Galveston and Missouri City, Texas, MM Docket No. 99-284, Comments of Tichenor License Corporation, dated November 8, 1999, copy in the record of this proceeding as Exhibit A to Reply Comments of Charles Crawford filed January 6, 2003.

facilities, including cases cited in the Bureau decision at fn.

7. However, such cases have a genuine 307(b) improvement in the deployment of the spectrum that stands in contrast with the cynical maneuvering on the part of Tichenor here, i.e.: To serve an Indian Reservation in a remote rural area, Oraibi and Leupp, Arizona, 14 FCC Rcd 13547 (1999). To move a second local station from a smaller community to a larger community as its second local station, Akeny and West Des Moines, Iowa, 15 FCC Rcd 4413 (2000). To move the 7th local station to a community as its first local station, Kankakee and Park Forest, Illinois, 16 FCC Rcd 6768 (2001). To move one TV channel as a first local service, leaving the departed community with three other local TV channels, El Dorado and Camden, Arkansas, 14 FCC Rcd 9564 (1999).

## II.

The Commission's "Tuck" allotment policy is impermissibly subjective and also flawed for failure to take into account the reasonable likelihood that an established powerhouse radio station in a major market would become the "first local outlet" for a tiny community in a corner of the market

14. Tichenor wants the Commission to accept the premise that its powerhouse KOBT serving the Houston and Beaumont markets, after all these years, is going to become a local outlet for the tiny community of Lumberton located in a corner of one of those markets. Right. How is it that parties can present such a scenario to the Commission and, instead of being ushered out the door, how is it that the Commission will buy it? It's something called the Tuck policy.

15. We are reminded of a protocol of the State Department.

During the 1800's and early early 1900's when our nation was actively acquiring interests in islands and territories in competition with nations such as England and Spain, statutes and other documents would at times provide that a given island or territory was "appertaining" to the United States. E.g., 48 U.S.C. §1411 regarding Navassa Island in the Caribbean near Cuba shortly prior to the Spanish-American War. The State Department explains the meaning of "appertaining" in this way: "The use of the word 'appertain' is deft, since it carries no exact meaning and lends itself readily to circumstances and the wishes of those using it." Sovereignty Study of State Department, 1931-1932, at 145-146 (copy attached as Exhibit 2 for handy reference). So, too, here, with respect to the Commission's Tuck policy.

16. The Tuck policy is a menu of wildly subjective criteria: (a) The extent to which the community residents work in the larger metropolitan area; (b) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (c) whether community leaders and residents perceive the specified community as being an integral part of, or separate from the larger metropolitan area; (d) whether the specified community has its own local government and elected officials; (e) whether the smaller community has its own telephone book provided by the telephone company or zip code; (f) whether the community has its own commercial establishments, health facilities, and transportation systems; (g) the extent to which the specified community and the central city are part of

the same advertising market; and (h) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries. Faye and Richard Tuck, 3 FCC Rcd 5374 (1988).

17. The kaleidoscope of combinations of facts and circumstances under these criteria is virtually endless. But there is more. All eight factors need not favor the applicant. If a majority of the factors favor the specified community and a minority are unfavorable, the specified community can be awarded the allotment. Id.; Parker and Port St. Joe, Florida, 11 FCC Rcd 1095, ¶¶9-11 (1996). So, there are kaleidoscopes of combinations of facts and circumstances both for and against the specified community.

18. But there is still more. Nowhere amongst this no-man's land of subjective facts and circumstances is there provision for the most crucial consideration of all, i.e., a determination of the reasonable likelihood that a broadcast station with a signal serving the central city or metropolitan area will in truth serve as a meaningful local outlet for a designated licensed community.

19. We don't know if the Morningside situation (in which tiny Morningside is the home of the top ranked station in the Baltimore-Washington market) was a product of the Tuck policy. But the Morningside case is symptomatic of the need to consider the reasonable likelihood of a meaningful local outlet for the smaller community in a major market in the Tuck line of cases.

For many years now, the Morningside example involving Infiniti's controversial and popular station has been a public fact of life in the Washington, D.C. area for the Commission and its staff to observe and alert them to this fatal flaw in the Tuck allotment policy.

20. In a case that is currently pending before the Commission, Quanah, Texas, et al, Bureau Memorandum Opinion and Order, released April 27, 2004 in MM Docket No. 00-148, and in a case that is currently pending before the United States Court of Appeals for the District of Columbia Circuit, Benjamin and Mason, Texas, Commission Memorandum Opinion and Order, released January 8, 2004, MM Dockets 01-131 and 01-133, sub nom. Crawford v. FCC and United States of America, No. 04-1031, while the Bureau has denied a counterproposal on technical grounds, the Commission has upheld the efficacy of Tuck presentations in that counterproposal on the premise that a full powered Class C allotment to serve the Dallas-Fort Worth radio market, ranked sixth in the nation, can be licensed as a local outlet for a tiny community imbedded in that market named Keller (population 13,683); a Class C-1 allotment to serve the Austin, Texas, market, the nation's 49th largest, can be licensed as a local outlet for a tiny community imbedded in that market named Lakeway (population 4,044); a Class C-2 allotment to serve the Austin market can be licensed as a local outlet for a tiny community imbedded in that market named Lago Vista, Texas (population 2,199); and, a Class C-1 allotment to serve the San Antonio radio market, the nation's 32nd largest,

can be licensed as a local outlet for a tiny community imbedded in that market named Converse (population 8,887).

21. Here, Tichenor asks the Commission to accommodate the interests of its powerhouse station in the Houston and Beaumont radio markets by licensing said station as the first local outlet for a tiny community imbedded in a corner of those markets. This preposterous proposition is aggravated by the shell game with communities of licenses of Tichenor stations in an attempt to defeat the Vinton allotment rather than any meritorious improvement in the Commission's allotment or deployment of spectrum to serve the public interest under the command of Section 307 of the Act.

22. In sum, the records in allotment proceedings in which the nebulous, subjective Tuck policy is applied, ignoring the realities of the radio marketplace, permit the agency to come down for or against an allotment, with equal force, on the very same record. The policy essentially boils down to what the agency wants the policy to mean. For sure, that is true in the case of reasoned agency decision-making under the Tuck policy pertaining to Lumberton. The Bureau's decision at ¶6 is a bit terse, to say the least, consisting of the following:

"...Tichenor has provided a showing that Lumberton is independent of Beaumont under the factors set forth in Faye and Richard Tuck. See 3 FCC Rcd 5374 (1988)."

The Tuck policy is better suited to the art of diplomacy than to compliance with the rigors of decisionmaking under Motor Vehicle, supra, and the Administrative Procedure Act.

## III.

The meritorious allotment at Vinton providing a first local radio service for a rural area should be favored in this proceeding

23. The Commission's FM allotment program in very substantial nature is about "numbers." In cases of a contest over preference for providing a first local radio service, the ultimate choice boils down to the numbers, often by very thin margins. The argument here fixes on the population of Vinton (3,338). If Tichenor were to play the cards in its present hand, Winnie (2,914) would be the loser, as would Crystal Beach (787). Hence the shell game in an effort to ratchet the population above Vinton's population.

24. In population coverage comparisons that often figure into allotment decisions, the process also is a game of numbers. For example, in the subject case, if there were no disposition of the allotment based on first local service, the choice could come down to the gain of some 270,000 people served by Tichenor vs. the population within the service area of a Class A station in a small town in rural Louisiana, obviously a fraction of the Tichenor figure. In the Quanah proceeding involving allotments for Dallas-Fort Worth, San Antonio and Austin, Texas, the gross coverage figure was huge, i.e., 4.3 million population.

25. When it comes to numbers, cities fare better than rural communities and areas because there are more people there. Not because those people are more important than people in rural communities and areas, or have greater broadcast needs or have more significant issues in their lives. There are just simply

more of them. As a result, in the numbers-driven allotment program, spectrum space has been and is being siphoned off to the cities and has been and is being withdrawn from use in the rural areas.

26. Mr. Crawford, a radio advertising executive by trade with offices in Dallas, and like minded colleagues believe that there is a future in rural radio and that it is important to act now to counterbalance the continued erosion of the available spectrum. For that reason, they have filed a substantial number of FM allotment petitions, all for small communities in or near rural areas. The Commission itself has recently shown signs of concern for rural areas. See, e.g., News Release, dated August 6, 2003, entitled FCC Commences Land of Opportunity Initiative for Rural America, Access to Affordable and Quality Telecommunications Services in Rural America; News Release, dated July 2, 2003, entitled FCC and United States Department of Agriculture Hold Kick-off Meeting of the "Federal Rural Wireless Outreach Initiative"; News Release, dated May 8, 2003, entitled FCC Acts to Enhance Rural Participation in Spectrum Auctions.

27. See also Albemarle and Indian Trail, North Carolina, Memorandum Opinion and Order, released May 20, 2004 in MM Docket No. 99-240, Statement of Commissioner Kevin J. Martin. The Statement of Commissioner Martin has direct application to the allotment for Vinton sought here: "Local radio stations play an important role in their communities, providing local news, information and entertainment to residents, and generally serving

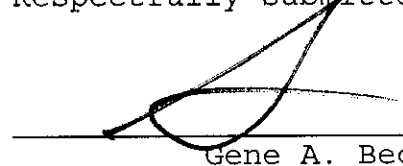


as good corporate citizens in local community life. This is particularly true in smaller towns, where the radio stations are limited in number. Yet there are still rural areas of our country that do not have even one local radio station. As a native of this part of North Carolina, I am therefore particularly pleased to approve the first local broadcast radio service in Indian Trail. I hope this new station serves the community well."

CONCLUSION

28. For the foregoing reasons, the Bureau decision should be reversed, the allotments relative to Crystal Beach, Lumberton and Winnie, Texas should be reversed, and the allotment to Vinton, Louisiana, should be granted.

Respectfully submitted,

  
\_\_\_\_\_  
Gene A. Bechtel

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Telecopier 301-762-0156

Counsel for Charles Crawford

June 3, 2004

EXHIBIT 1

Coverage maps of Tichenor stations

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find US radio stations by location  
 city/zip  state   find by call letters

**WINNER**

If flashing, you've been selected!

## KOBT-FM 100.7 MHz

Winnie, Texas

**Station Format:** *Spanish*

[tell me about "Spanish" stations](#)

[find more Spanish stations](#)

### Station Owner:

Tichenor License Corporation ("Tlc")

[find stations owned by Tichenor License Corporation \("Tlc"\)](#)

this feature is only available to [Gold Customers](#)

**Website:** none

**Audio Feed:** none

### Station Address:

3102 Oak Lawn  
 Suite 215  
 Dallas, TX 75219

### KOBT-FM Technical Info:

**Station Status** Licensed Class C FM Station  
**Area of Coverage** [View Coverage](#)  
**Effective Radiated Power** 100,000 Watts  
**Height above Avg. Terrain** 595 meters  
**Height above Sea Level** 609 meters  
**Antenna Pattern** Non-Directional  
**Transmitter Location** 30° 3' 5" N., 94° 31' 37" W.  
**License Granted** April 04 1997  
**License Expires** August 01 2005  
**Last FCC Update** April 04 1997

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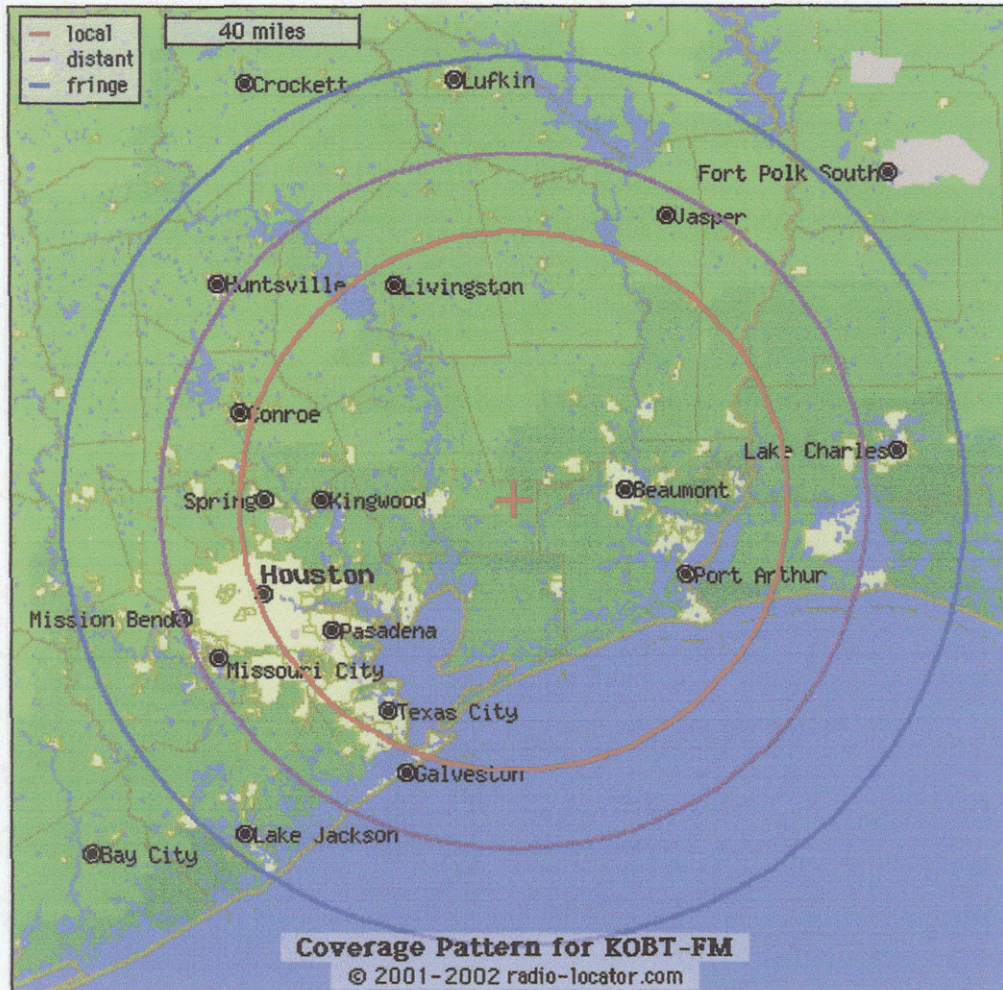
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**FREE stores!**

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## Predicted coverage pattern for **KOBT 100.7 FM**, Winnie, TX



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**WINNER**

**If flashing, you've been selected!**

**KQBU-FM 93.3 MHz**

Port Arthur, Texas

**Station Owner:**

Tichenor License Corporation ("Tlc")

[find stations owned by Tichenor License Corporation \("Tlc"\)](#)

[this feature is only available to Gold Customers](#)

**Station Format: *Spanish***

[tell me about "Spanish" stations](#)

[find more Spanish stations](#)

**Website:**

<http://www.netmio.com/radio/kqbu/>

**Audio Feed:** none

**Station Address:**

3102 Oak Lawn Ave.

Suite 215

Dallas, TX 75219

**KQBU-FM Technical Info:**

**Station Status** Licensed Class C FM Station

**Area of Coverage** [View Coverage](#)

**Effective Radiated Power** 97,000 Watts

**Height above Avg. Terrain** 595 meters

**Height above Sea Level** 609 meters

**Antenna Pattern** Non-Directional

**Transmitter Location** 30° 3' 5" N., 94° 31' 37" W.

**License Granted** September 13 1996

**License Expires** August 01 2005

**Last FCC Update** September 13 1996

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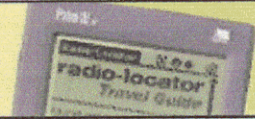
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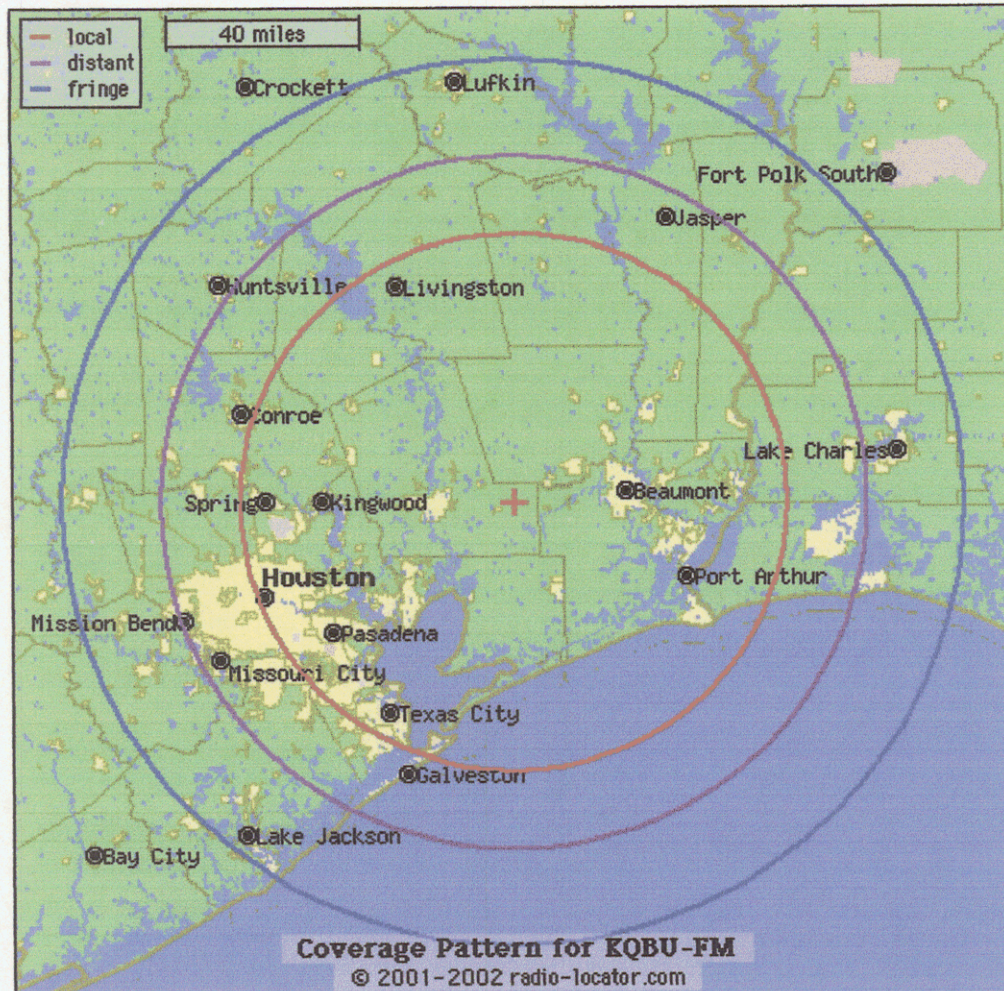
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## Predicted coverage pattern for **KQBU 93.3 FM**, Port Arthur, TX



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EXHIBIT 2

Sovereignty Study of State Department  
1931-1932, pp. 145-146

"not within the lawful jurisdiction of any other government" shall be occupied by American citizens. The discoverer of guano was to make such assertion, under oath. This assertion was made as to the Swan Islands, and a certificate, based in part thereon, was issued. If the jurisdiction, or claim of jurisdiction, of another State had been advanced the certificate would have been refused. The Cayo Verde Case, cited above, is illustrative. The mere issuance of a certificate, based upon the represented state of facts, cannot modify or alter the true facts. It would seem to follow that the Swan Islands, dominion over which was in Honduras, were not of that class of islands contemplated in the Act.

The same section provides that islands so possessed may be considered at the discretion of the President "as appertaining to the United States". The use of the word "appertain" is deft, since it carries no exact meaning and lends itself readily to circumstance and the wishes of those using it. It has given rise to such words as "appurtenant" and "appurtenance". The common law denies that land can be appurtenant to land. In a strict sense an island cannot be appurtenant to other territorial possessions. If the word "appertain" and its variants cannot be given a strict meaning they lose what little value they have when relied upon for the creation or

assertion



assertion of legal rights. The meaning of the Act must be found outside the phrase quoted above.

Section 1418 authorizes the President "at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer..." If, upon occupation under the Guano Act, the islands were to become a part of the domain of the United States such authorization would be unnecessary. Further, the President probably would not have received discretionary power.

Section 1419 provides that nothing in the Act "shall be construed as obliging the United States to retain possession of the islands ...." after the removal of guano. If the word "possession" was used in a strict sense it follows that a mere temporary occupation, for a fixed purpose, was contemplated. Of course, possession could be retained. But it is doubtful if the Act contemplated such occupation as would give rise to the right of sovereignty.

Section 1412 stipulates that a discoverer shall show, inter alia, that "possession was taken in the name of the United States...". This condition was included in the Attorney General's opinion of June 2, 1857. As shown above, several certificates recited that occupation was taken in the name of the United States; the Swan Islands certificate did not. But it is my opinion that

CERTIFICATE OF SERVICE

I certify that on this 3rd day of June, 2004, I have caused copies of the foregoing PETITION OF CHARLES CRAWFORD FOR RECONSIDERATION to be placed in the United States mails, first class, postage prepaid, to the following counsel for Tichenor License Corporation:

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